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THE STATE BAR COURT
HEARING DEPARTMENT - LOS ANGELES

In The Matter of

BRIAN J. KRAMER

No. 179863

A Member of the State Bar,

Case No.: 06-O-14460

**RESPONSE TO NOTICE OF
DISCIPLINARY CHARGES**

Brian J. Kramer, Respondent ("Respondent") responds to the Notice of Disciplinary
Charges ("NDC") on file herein as follows:

JURISDICTION

1. Respondent admits the allegations contained in Paragraph 1 of the NDC.

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COUNT ONE

2. Respondent specifically denies each and every allegation contained in Paragraph 2 of Count One of the NDC.
3. Respondent admits and specifically denies the allegations contained in Paragraph 3 of Count One of the NDC as follows: Respondent specifically denies that Daniel Hansen ("Hansen") was a "construction contractor." Respondent is informed and believes and based upon such information and belief alleges that Hansen never operated lawfully as a licensed contractor in the State of California. Hansen obtained a contractor's license in July 2004, but that license was revoked in October 2008 by the Contractor State License Board ("CSLB") pursuant to Business and Professions Code §7112 after it was discovered that Hansen had committed acts of licensure application fraud in the procurement of his license. Respondent admits he entered into a fully integrated and written construction contract with Hansen, and engaged in other unrelated business transactions with Hansen from 1999 to 2005. Respondent admits that in October 2005 he entered into a settlement agreement with Hansen.
4. Respondent has insufficient information to admit or specifically deny the allegations contained in Paragraph 4 of Count One of the NDC and based upon such insufficient information specifically denies each and every allegation contained in Paragraph 4 of Count One of the NDC as follows: Respondent is informed and believes that Jose Feliciano was one of several workers who Hansen employed while operating as an uninsured and unlicensed contractor from 2002 to 2005. Respondent specifically denies that he recommended to Holly Brooks ("Brooks") that she use Hansen for the numerous contracting projects that he performed for Brooks from 2002 to 2005. Respondent is informed and believes and based upon such information and belief alleges that said contracting jobs were secured by Hansen after he submitted written bids to Brooks, in which he misrepresented himself to be a general contractor who was "licensed, bonded and insured."

- 1 5. Respondent has insufficient information to admit or specifically deny the allegations
2 contained in Paragraph 5 of Count One and based upon such insufficient information
3 specifically denies each and every allegation contained in Paragraph 5 of Count One
4 as follows: Respondent is unable to discern what motivated Hansen's attorneys to
5 attempt to join Respondent as a party defendant in the worker's compensation action
6 filed by Jose Feliciano ("Feliciano") against Hansen. Respondent specifically denies
7 that Feliciano was ever employed by Respondent in connection with the contracting
8 work that Hansen performed for Respondent pursuant to the parties written
9 construction contract. The construction contract makes clear that Hansen was
10 responsible for overseeing and supervising his workers (including Feliciano); Hansen
11 was legally obligated as a contractor who employed such workers in his business to
12 carry worker's compensation insurance to protect his workers and his customers
13 (including Brooks and Respondent) from worker's compensation claims pursuant to
14 Business and Professions Code §7125. Respondent specifically denies that Hansen
15 had any viable legal or factual basis to seek to join him as a party defendant in the
16 worker's compensation action, given the injury to Hansen's worker/employee
17 occurred at Brooks' residence and it was Hansen's legal obligation to carry worker's
18 compensation insurance.
- 19 6. Respondent admits the allegations contained in Paragraph 6 of Count One of the
20 NDC.
- 21 7. Respondent admits the allegations contained in Paragraph 7 of Count One of the
22 NDC as pled. However, between March 19, 2007 and March 21, 2007, upon the
23 advice of counsel Respondent and Brooks decided not to implement the assignment
24 arrangement set forth in their agreement.
- 25 8. Respondent is informed and believes and based upon such information and belief
26 admits the allegations contained in Paragraph 8 of Count One of the NDC as follows:
27 Brooks was the plaintiff and real party in interest in the action styled as *Brooks v.*
28 *Hansen*, which was filed in the Los Angeles Superior Court, Case No. BC 368331

1 ("Brooks Action") on March 21, 2007. Brooks decided to file suit and become the
2 plaintiff and real party in interest in the Brooks Action because Respondent and
3 Brooks decided prior to the Brooks Action being filed not to implement the
4 assignment arrangement as set forth in the agreement they executed on March 19,
5 2007. Brooks returned to Respondent the check in the amount of \$10,000 which she
6 never negotiated. Brooks was at all times represented by the experienced civil
7 litigation law firm of Weiss & Hunt, and she successfully prosecuted her lawsuit
8 against Hansen.

9 9. Respondent specifically denies each and every allegation contained in Paragraph 9 of
10 Count One of the NDC. The language in the assignment agreement makes clear that
11 Respondent only contemplated possibly prosecuting Brooks' claims as an assignee to
12 the "fullest extent permitted by California law." This language was used because
13 Respondent and Brooks intended to, and did rely on the advice of their counsel,
14 regarding how to proceed and whether or not to implement the contemplated
15 assignment arrangement. The language further demonstrates the intentions of
16 Respondent and Brooks were to act lawfully in connection with pursuing their rights
17 against Hansen as a result of Hansen's causing both parties harm by performing
18 unlicensed and uninsured contracting work on their homes from 2002 to 2005.

19 10. Respondent specifically denies each and every allegation contained in Paragraph 10
20 of Count One of the NDC. Business and Professions Code §6129 is a penal statute
21 and therefore must be strictly construed in its application. See *Martin v. Freeman*
22 (1963) 216 Cal. App. 2d 639, 642-643 (Section 6129 is a penal statute of "precise and
23 limited content which proscribes only a very few of the many activities which two
24 centuries and more ago were considered champertous."). Not only is the common law
25 doctrine of champerty antiquated,¹ but modern contract law freely permits assignments
26

27 ¹ "California has never adopted the common law doctrine of champerty and maintenance." *Martin v. Freeman*
28 (1963) 216 Cal. App. 2d 639, 642-643. Over a hundred years ago, the California Supreme Court held in *Mathewson*

1 of a chose in action.² The purpose of §6129 “is to prevent the officious fomenting of
2 litigation,” not to prevent parties such as Respondent and Brooks who were already
3 entangled in litigation and/or conflict with a common adverse party (Hansen) from
4 cooperating with on another in a manner that Brooks and Respondent ultimately did
5 pursuant to the advice of experienced counsel. *Martin v. Freeman supra* holding that
6 a transfer of a claim to an attorney, which attorney then actually sued upon, in
7 consideration for an antecedent debt did not violate 6129; also see *In re Cummins*
8 *Estate* (1904) 143 Cal. 525 (holding that a contingent fee paid in consideration for the
9 services of the lawyer did not violate the statute).

10 FIRST AFFIRMATIVE DEFENSE

11 (Collateral Estoppel, Res Judicata And Judicial Comity)

- 12 11. After Brooks filed her lawsuit against Hansen in the Brooks Action on March 21,
13 2007, Hansen, on several occasions unsuccessfully litigated the assertion that
14 Respondent had violated Business and Professions Code §6129. The issue of whether
15 Respondent violated this section has already been adjudicated in Respondent’s favor
16 by a federal judge, two state court bench officers and the California Court of Appeal.
- 17 12. **Hansen first unsuccessfully asserted that Respondent violated Business and**
18 **Professions Code §6129 in connection with the Demurrer and Motion to Strike**
19 **he filed in the Brooks Action:** After being served with the complaint in the Brooks
20 Action, Hansen filed a Demurrer and Motion to Strike the Complaint. Hansen’s main
21 contention was that Respondent allegedly violated Business and Professions Code §
22 6129 by entering into the assignment agreement with Brooks. In opposition to

23
24
25 v. *Fitch* (1863) 22 Cal. 86, that champerty had become obsolete as a crime in England, and American courts
26 concluded that maintenance (which was held to include champerty) had no real foundation in the United States.

27 ² Under modern contract theory, the assignment of a chose in action is authorized by the Civil Code, which
28 eliminated common law prohibitions on such assignments. See Witkin, Summary of California Law, “Contracts,”
Section 921; see also Civil Code Sections 953 and 954.

1 Hansen's Demurrer and Motion to Strike, Brooks explained why no such violation
2 had occurred. Hansen's Demurrer and Motion to Strike in the Brooks Action were
3 overruled by the Honorable Ralph Dau, Judge of the Los Angeles Superior Court.
4 Much like the losing defendant did in *Crocker Citizens Nat. Bank v. Knapp* (1967)
5 251 Cal. App.2d 875, 882 ("*Knapp*"), Hansen asserted that the claims which were
6 being pursued in the Brooks Action were the subject of an assignment agreement that
7 allegedly violated Business and Professions Code § 6129 and were therefore void. In
8 *Knapp* the court found that there was no viable section 6129 violation when an
9 attorney who had been assigned a claim/debt did not bring suit on that claim, but
10 instead re-assigned it to another non-lawyer to bring suit on the claim/debt:

11 **"It was Kaufman, not Taub, who sued upon the debt...Lacking the element**
12 **of intent to bring an action upon the note, Taub was int in violation of the**
13 **section, and validly purchased and reassigned the judgment."** (Emphasis
added). *Knapp* at 882.

14 As in *Knapp*, in the Brooks Action it was Brooks, and not Respondent who filed suit
15 against Hansen. Therefore, Judge Dau and all of the subsequent bench officers who
16 ruled on this issue decided the matter correctly on this basis alone.³

17 **13. The second time Hansen alleged that the claims in the Brooks Action were**
18 **subject to an alleged illegal assignment arrangement in violation of Business and**
19 **Professions Code §6129 was in his failed opposition to Brooks' Application for a**
20 **Pre-Judgment Right to Attach Order ("RTAO"):** Following Judge Dau's
21 overruling Hansen's Demuurer and Motion to Strike, Hansen once again argued as a
22 primary point of contention to Commissioner Victor Greenberg that there had been a
23 violation of Business and Professions Code §6129 in opposing Brooks' Application
24 for a RTAO. On December 11, 2007, Commissioner Greenberg granted Brooks'
25 application for a RTAO in the amount of approximately \$369,000. It is well settled
26 that applications for pre-judgment right to attach orders can only be granted by a trial
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28 ³ Judge Dau's Order dated December 4, 2007.

1 court upon a showing of likelihood of success on the merits. As demonstrated by the
2 grant of Brooks' application for a RTAO Commissioner Greenberg found no merit in
3 Hansen's repeated assertions that Respondent violated Business and Professions Code
4 §6129. On December 19, 2007, Hansen filed a Notice of Appeal arising out of
5 Commissioner Greenberg's grant of Brooks' application for a RTAO.⁴ On April 17,
6 2008 the California Court of Appeal issued a Remittitur dismissing Hansen's appeal.

- 7 **14. The third time Hansen asserted that the aborted assignment arrangement**
8 **between Brooks and Respondent violated Business and Professions Code §6129**
9 **was in connection with Hansen's unsuccessful Opposition to the Motion that**
10 **Brooks filed in Hansen's Bankruptcy Case to convert it from Chapter 11 to a**
11 **Chapter 7:** Following several litigated defeats in both the Brooks Action and Kramer
12 Action and becoming the target of an investigation by the CSLB for his acts of
13 licensure application fraud, Hansen filed for Chapter 11 bankruptcy. In response,
14 Brooks filed a motion in the bankruptcy case pursuant to U.S.C. §1104(a) to convert
15 the proceeding from a Chapter 11 re-organization to a Chapter 7 (straight
16 liquidation).⁵ In opposing Brooks' motion, Hansen again made the aborted
17 assignment arrangement his primary focus. On May 12, 2008, the Honorable Barry
18 Russell, U.S. Bankruptcy Judge granted Brook's motion converting Hansen's
19 bankruptcy proceeding to Chapter 7, and Hansen was displaced as the debtor in
20 possession and a Chapter 7 Bankruptcy Trustee was installed.

21
22 ⁴ Hansen lost his appeal after he failed to prosecute it. The California Court of Appeal, Second Appellate District in
23 Case No. B204701, issued and filed a Remittitur on April 21, 2008 making the decision from which Hansen
24 appealed final.

25 ⁵ The standard for seeking such relief is very high as it requires "a party in interest, "to make a showing that the
26 debtor engaged in fraud, dishonesty, incompetence, or gross mismanagement of the affairs...either before or after
27 the commencement of the case." Brooks' motion seeking conversion to a Chapter 7 case was based on Hansen's
28 pervasive pre-filing acts of fraud and mismanagement.

1 **15. The fourth and fifth occasions that Hansen unsuccessfully litigated the claim**
2 **that Respondent had violated Business and Professions Code §6129 was in**
3 **connection with the cross-claims that he filed against Respondent in the Brooks**
4 **Action and the cross-complaint in the Adversary Action in his bankruptcy:** In
5 both counterclaims Hansen alleged Respondent had violated Business and
6 Professions Code §6129, and as a result had breached an alleged fiduciary duties
7 and/or committed violations of Business and Professions Code §17200.⁶ On October
8 31, 2008, Respondent and Brooks filed motions to dismiss the Counterclaim that
9 Hansen filed in the Adversary Action in Hansen's personal bankruptcy case.
10 Hansen's personal bankruptcy case was styled as *In re Daniel R. Hansen*, Debtor
11 (Chapter 7) Case No. 2:08-BK-11950, and was commenced by the debtor on
12 February 14, 2008. Respondent and Brooks jointly filed an adversary action in the
13 Bankruptcy Case which was styled as *Holly Holmberg Brooks, Brian J. Kramer*
14 *Creditors/Plaintiffs v. Daniel Robert Hansen*, Adversary Case No. 08-01728-BR
15 objecting to Hansen's request for a discharge. Those dispositive defense motions
16 were filed pursuant to Federal Rule of Civil Procedure §12(b)(6) as well as
17 California's Anti-SLAPP statute (CCP§425.16).⁷ On December 2, 2008, United
18 States Bankruptcy Judge Barry Russell issued orders granting Respondent's and
19 Brooks' dispositive defense motions pursuant to FRCP §12(b)(6) and California's
20 Anti-SLAPP statute thereby dismissing Hansen's counterclaim. Following Judge
21 Russell's grant of the defense motions in the Adversary Action and dismissal of
22 Hansen's counterclaim in the adversary action, on February 4, 2009, Judge Ralph
23 Dau also granted Respondent's then still pending Anti-SLAPP motion in the Brooks
24

25 ⁶ A review of paragraphs 92 to 95 of the Counterclaim that Hansen filed in the Adversary Action on October 9, 2009
26 confirms that Hansen was alleging Respondent violated Business and Professions Code §6129.

27 ⁷ Anti-SLAPP motions may only be granted after a court considers, among other factors, the merits of a plaintiff's
28 claims.

1 Action based on the doctrine of claims preclusion and *res judicata* grounds. As a
2 result of these rulings and orders, there has been a final and complete adjudication of
3 all issues raised therein, including Hansen's repeated allegations Respondent violated
4 Business and Professions Code §6129. The United States Supreme Court has made
5 clear that "[a] dismissal for failure to state a claim [on a FRCP §12(b)(6) motion] is
6 treated as an adjudication on the merits." *Bell v. Hood* (1946) 327 U.S. 678, 682.
7 Such a dismissal bars further litigation of the claim when it determine "the real or
8 substantial grounds of action or defense. Stated another way, [t]he judgment is on the
9 merits if it is based on the substantive law, and determines that the plaintiff has no
10 cause of action." *Boccardo v. Safeway Stores, Inc.* (1982) 134 Cal. App.3d 1037,
11 1042. "Full faith and credit must be given to a final order or judgment of a federal
12 court." *Levy v. Cohen* (1977) 19 Cal.3d 165, 172. In federal court, *res judicata*
13 prevents the re-adjudication of all matters (including jurisdiction) which were, or
14 might have been, litigated in a prior proceeding between the same parties. *Id.* At p.
15 173. *State Bar of California v. Statile* (2008) 168 Cal. App.4th 650 sets forth the four
16 basic elements for the doctrine of collateral estoppel to be applicable, all of which are
17 present in this matter.

18 SECOND AFFIRMATIVE DEFENSE

19 (Advice of Counsel and No Viable Violation Asserted)

- 20 16. As a result of Hansen's acts in connection with the contracting work he performed for
21 Brooks from 2002 to 2005, Brooks had various claims against Hansen. Those claims
22 included her right to recover fees which Brooks had paid to Hansen (approximately
23 \$369,000) for unlicensed contracting work pursuant to Business and professions Code
24 §7031 (b). Brooks also had a claim for fraud as Hansen had misrepresented himself to
25 be a "licensed, bonded and insured" general contractor.
- 26 17. It was Hansen's unjustifiable attempt to impose liability on Respondent for an
27 accident involving his worker (Feliciano) at Brooks' house that resulted in Brooks
28 and Respondent cooperating with one another against their former contractor. While

1 Hansen asserted in various forums where he has litigated against Brooks and
2 Respondent, that Respondent and Brooks' collaborative efforts were in violation of
3 Business and Professions Code §6129, those efforts were lawful and appropriate
4 under the circumstances. Moreover, those efforts were coordinated, supervised and
5 advised by Respondent's and Brooks' experienced civil litigation attorney, Thomas J.
6 Weiss ("Weiss").⁸

7 18. As set forth in the First Affirmative Defense, Hansen's assertion that Respondent
8 violated Business and Professions Code §6129 has been fully litigated and
9 adjudicated in Respondent's favor on at least five prior occasions in four separate
10 forums. Significantly, none of the prior federal or state judicial officers who
11 considered and rejected the assertions that Respondent violated the section have
12 referred this matter to the California State Bar for consideration of disciplinary
13 charges.

14 19. Under modern contract law, parties who have signed contracts are free to consult with
15 counsel and agree amongst themselves not to consummate some of, or all of their
16 contemplated arrangements and/or to cancel, revoke or novate such contemplated
17 arrangements in whole, or in part. Although Respondent and Brooks did sign the
18 assignment agreement on **March 19, 2007** within two days they consulted with
19 counsel and decided not to implement the contemplated assignment arrangement
20 contained in the agreement. Brooks never followed through with selling her claims to
21 Respondent, and in fact maintained those claims and successfully prosecuted them in
22 the Brooks Action, which was filed on **March 21, 2007**.

23 20. As a result of Brooks' and Respondent's decision not to consummate their assignment
24 arrangement, Brooks returned the un-cashed check for \$10,000 to Respondent which
25 he had provided in consideration of the contemplated assignment of claims. As noted,
26

27 ⁸ Mr. Weiss is a Harvard Law School graduate and has been admitted to the California State Bar since 1976, and he
28 has practiced as a civil litigator ever since.

1 Brooks personally proceeded with her claims against Hansen, with Mr. Weiss as her
2 counsel at all times.

3 21. All of the pleadings filed by Mr. Weiss and his law firm, Weiss & Hunt in the Brooks
4 Action make clear that Brooks was the plaintiff and real party in interest. Had
5 Respondent and Brooks decided to implement their assignment arrangement (which
6 they did not), under the "real party in interest" rules established under §367,
7 California Code of Civil Procedure, Weiss & Hunt would have been required to have
8 named Respondent in all of the pleadings as "an assignee suing on behalf of Brooks."
9 See Don Rose Oil Co. v. Lindsley (1984) 160 Cal. App.3d 752 (holding that an
10 assignee of rights is a real party in interest under CCP §367).

11 22. Also acting on the advice of counsel, Respondent and Brooks executed writings
12 which memorialized their decision not to consummate their contemplated assignment
13 arrangement. Those various writings, which included a release and novation
14 agreement and acknowledgement and waiver of interest, were part of the record
15 before the courts which resolved the matters referenced above in paragraphs 12 to 15.

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18 DATED: January 5, 2010

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MICHAEL G. GERNER
Attorney for Respondent
Brian J. Kramer

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 425 South Beverly Drive, Suite 210, Beverly Hills, California 90212.

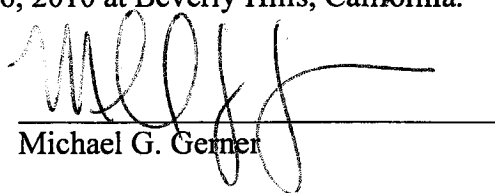
On January 6, 2010 I caused to be served the documents described as:

RESPONSE TO NOTICE OF DISCIPLINARY CHARGES

By placing a true copy thereof in a sealed envelope and personally serving as follows:

Hugh G. Radigan, Deputy Trial Counsel
State Bar of California
1149 S. Hill Street
Los Angeles, CA 90015

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 6, 2010 at Beverly Hills, California.



Michael G. Gerner